



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 80 OF 2018**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....APPELLANT**

**VERSUS**

**IRFAN AZAD KARA BADRUDIN.....RESPONDENT**

**J U D G M E N T**

1. In this appeal the Appellant has by the eight (8) grounds in the Memorandum of Appeal dated 14/5/2018 faulted the trial court for having granted orders of review without the thresholds being met and generally for making determinations contrary to the law applicable.
2. The decision giving right to this appeal was dated and delivered on the 4/5/2018 E. Makori CM. That determination was on two applications all targeting an earlier ruling of the court dated 30/8/2017 in which the court had granted a temporary injunction against the Appellant, as the defendant then, and restraining it from charging interest on the plaintiffs account and from reporting him to the Credit Reference Bureau together with an order discharging a professional undertaking given by Nabhan & Swaleh Advocate to the Appellant upon payment of sums owed by the respondent to the Appellant.
3. The gist of the Respondents application was that as a customer of the bank he had a fixed deposit of Kshs.5,331,380.13 which he sought to be utilized toward the reduction of his own obligation to the bank then outstanding at Kshs.8,647,596.00. That application was supported by the Affidavit of the Respondent which exhibited and annexed various documents including correspondences on requests to discharge the Respondent's indebtedness to the bank by the deposits held by the said bank.
4. The application by the Appellant on its side sought a review to the extent that the court make a determination on payment of fees due to **Nabhan & Swaleh Advocates** and to set timelines within which the plaintiff would pay the sum of Kshs.8,647,596 as ordered on the 30/8/2017. In effect, the Appellant's application was informed by the fear that if the undertaking was discharged before payment was made it would remain exposed without any security for its debt.
5. The Respondents application was opposed by the Appellant through the grounds of opposition dated 5/12/2017 while the Appellants application was opposed by the Replying Affidavit sworn on the 4/12/2017.
6. In the Grounds of opposition the Appellant contended that the Respondents application offended both Section 50(2) Kenya Deposit Insurance Act as well as Order 45 of the Civil Procedure Rules.
7. For the Respondent, the Replying Affidavit opposed the Appellants application on the basis that the application was omnibus without specific order sought on review and that there was no obligation upon him to pay the fees to the advocate on the undertaking as that fees was due for the Appellant as shown by the correspondence exhibited.
8. The Application was then directed to be canvassed by way of written submission. Pursuant to such directions the Appellant filed a list of authorities dated 6/11/2017 and submissions dated 26/01/2018.
9. After considering the respective submissions, the trial court in the ruling now challenged allowed both application and said:-

**“As stated above the defendants does not seem to oppose that it holds deposit accounts with the plaintiff money which can be used to defray the undisputed sum herein hence the prayers by the plaintiff in his application dated 8<sup>th</sup> November 2017 seems undisputed as to the availability of such funds in the plaintiff Deposit accounts and Credit of Kshs.592,375.7. There is also a need to give timelines within which parties to comply.**

**The court then will proceed to issue further orders as follows reviewing orders dated 30<sup>th</sup> August, 2017:-**

i. That the Defendants utilizes monies held in the various Deposit Accounts held by the plaintiff to defray part of the undisputed claim of Kshs.8,647,596 together with the credit given to the plaintiff of Kshs.592,375.75 as shown in (ii) below.

ii. The figures to look as follows:

Undisputed figure as follows:

Kshs.8,647,596

Less Kshs.592,375.57

Kshs.5,331,380.13 held in fixed deposit

Account Nos.5312613001

002DEPI 15188001,002DEP3133430001, and 002

DP211040002

Balance Kshs.2,723,840.30

iii. The remaining balance Kshs.2,723,840.30 be paid to the defendants in any event not later than 30 days hereof in return the defendants is hereby compelled to discharge the professional undertaking given by Sachdeva Nabhan & Swaleh Advocates in respect of apartment Nos.E8 Block E erected on Land Reference Nos.18913 (original Nos. 6963/1) of Section 1 Mainland North Mombasa pending the hearing and determination of this suit.

Iv. The other orders issued on 30<sup>th</sup> of August 2017 to remain undisturbed pending the hearing and determination of the mains suit.”

10. This is the rendition the appellant faults on the ground in the Memorandum of Appeal

#### Analysis and determination

11. My reading of the Memorandum of Appeal does not convince me that all the ground attack the decision appealed from rather grounds 7 seems to be an attack on a decision other than that of 4/5/2018. That ground is not relevant to the appeal for it relate to a wholly different determination. I will not address my mind to it.

12. I will therefore only consider grounds 1, 2, 3, 4, 5, 6, & 8. Those grounds in my view can conveniently be rephrased and consolidated into 3 grounds as follows:-

i. The trial court erred in improperly exposing and applying the provisions of Order 45 (grounds 1, 2, 3 and 8)

ii. The trial court erred in law in his determination of discharging professional undertaking contrary to the law (ground 4).

iii. The trial court erred in law in granting mandatory and final orders at an interlocutory stage and granting favourable orders to a party who had admitted indebtedness.(ground 5 & 6).

13. This being a first appeal the court proceeds by way of a retrial with the duty and mandate to re-appraise, re-evaluate and re-examine the entire record at trial and with a view to coming to own conclusions. In undertaking such a mandate I remind myself that the trial court was faced with two different applications both seeking review of its previous orders. In its determination both applications were in deed allowed. The appeal however is frame in a manner suggesting that it challenges the entire decision. Maybe a keener attention to detail in crafting the memorandum would have been of help here.

14. According to the decision appealed against, the trial court found that the two applications were a chain reaction by the two parties on compliance part as to the implementation of the order. Part of the orders the parties sought to be reviewed was worded as follows:-

**The defendants did not file any affidavit to controvert the version as placed by the plaintiff that there exists monies in his fixed accounts. The defendants did not offer any counter proposal when asked to have the money used to defray the loan.**

**On the issue of discharge of undertaking entered by one NABHAN & SWALEH Advocates dated 29<sup>th</sup> September 2014 this issue was settled by the Ruling/delivered on 30<sup>th</sup> of August 2017 as follows:-**

**“ii) An order is hereby issued to compel the defendants to Discharge the professional undertaking given by Sachedeva Nabhab & Swaleh Advocates in respect of apartment Nos, E 8 BLOCK E erected on Land Reference Nos. 18913 (original Nos. 6963/1) of Section 1 Mainland North Mombasa. The plaintiff in return to liquidate the**

**undisputed sum of Kshs.8,647,596 being the principal sum admitted by the Respondents by the applicants as at 13<sup>th</sup> October 2015 pending the hearing and determination of this suit”.**

15. It is apparent that as the Respondent was seeking to having this order implemented by utilization of the deposits held and payment of the balance the Appellant was complaining that the discharge of the undertaking prior to payment of the sum due would leave it exposed and without any security in that no timelines were set for the payment of the sum of Kshs.8, 647,596/=

16. it is not lost to me that the two applications as crafted sought the court’s jurisdiction to review under the limb, “*for any other sufficient reason*”. I say so because no material was availed to suggest a discovery of *a new and important matter of evidence or a mistake apparent on the face of the record*. That being my finding, the determination of the appeal would therefore seek to answer whether there had been established a sufficient reason to review the previous orders.

17. In my view the two applications did ask the court to help them with terms of implementation of the orders given and I do consider that there being sufficient reasons for review the decisions. For the Appellant he wanted certainty that the undertaking not be discharged before payment. I hold the view that concern was properly captured by the orders sought to be reviewed save that it was not in express words.

18. And for the respondent it was a question of asking the court;

*You have directed me to pay the sum of Kshs.8,647,596/= and the Appellant acknowledge owing to me some 5,331,380.13. Let them utilize what they owe and I top up the shortfall.*

19. The appellant opposed the application on the basis that it was against the provisions of section 50(2) of the Kenya Deposit Protection Act but offered very little submissions on the point. In my view, this was the only substantive point begging for detailed consideration by the parties and it was to me a failure on the appellant’s part not do more to serve the court better. That provision reads:-

For the purposes of discharging its responsibilities as receiver, the Corporation shall have power to declare a moratorium on the payment by the institution to its depositors and other creditors and the declaration of the moratorium shall—

(a) be applied equally and without discrimination to all classes of creditors:

Provided that the Corporation may offset the deposits or other liabilities owed by the institution to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution;

20. The statute gives to the corporation wide and befitting powers to manage a trouble deposit taking institution with the sole intent to secure the interests of all the stakeholders with particular concerns for the depositors. The purpose of the moratorium is to shield the institution from possible rush at withdrawals so that prospects of revival may be sustained. The wide powers include the power to offset deposits against loans so that the loan book which often is the baggage weighing down the financial health of the institution may be bettered. Maybe after filing the application prior to reading this provision, counsel came by the provision and honourably held back the opposition without saying so. On my part as an appellate court, I do find that there was nothing in the law that militated against the requested offset and that there was no error in appreciating both facts and the law to warrant my interference with the trial court’s decision.

21. I do find that there was no error committed by the trial court in granting orders what largely went towards clarifying the orders of 30/8/2017. I have been unable to see any overstepping of mandate or the court acting as an appellate over its own orders. It is also clear from the orders of the court given on 30/8/2017 and reiterated on that of 4/5/2018 that the court had not concluded the matter because the court set the time within which the parties were to take a date for hearing the outstanding issues in the suit which it indeed set out to be four (4) substantive issues and the fifth issue on costs.

19. I do find that the Appeal wholly lacks merits and the same is hereby dismissed with costs. Let the matter proceed for the determination of the outstanding issues before the trial court as ordered and the trial court.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of November 2019.**

**P.J.O. OTIENO**

**JUDGE**